

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-4005

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

Nos. 77-4005, 77-4020, 77-4059

INTERNATIONAL BUSINESS
MACHINES CORPORATION, *et al.*
Petitioners.

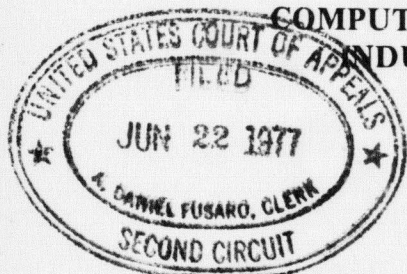
v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

AMERICAN TELEPHONE
AND TELEGRAPH COMPANY, *et al.*,
Intervenors.

On Petitions to Review Order of the
Federal Communications Commission

**BRIEF FOR PETITIONER
COMPUTER & COMMUNICATIONS
INDUSTRY ASSOCIATION**



March 24, 1977

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RULING BELOW

The Memorandum Opinion and Order of the Federal Communications Commission has not yet been reported. A copy of this Order appears in the Joint Appendix at page 969.

JURISDICTION

Jurisdiction in this matter is based on Section 204(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a) (1970 ed.) and on 28 U.S.C. §§ 2342-2343.

QUESTIONS PRESENTED

I

Whether the Commission's failure to rule on Petitioner's request for suspension of the tariff revision violates the Commission's rules of procedure.

II

Whether the Commission's failure to hold an evidentiary hearing on Petitioner's request for suspension is in violation of Section 201 and 204 of the Communications Act of 1934.

III

Whether the Commission's decision is plainly erroneous and inconsistent with its rules and regulations.

IV

Whether the Commission's decision is an erroneous conclusion of law under Sections 201-205 of the Communications Act of 1934.

STATUTES INVOLVED

47 U.S.C. § 153 (a) and §§ 201-205 are set out in pertinent part in Exhibit A.

INTRODUCTION AND STATEMENT OF FACTS

A. Introduction

The CCIA is a trade association representing approximately 40 small and medium sized companies in the computer and communications industry. These companies offer a wide variety of products and services, several of which compete indirectly with the Bell System offerings. In the data terminal market, several CCIA members offer products which compete directly with the AT&T Dataspeed 40/4. There is an industry which developed in the late 1960's largely as a result of the computer user's recognition that the AT&T-supplied Teletype equipment could not ef-

fectively fulfill the requirements of their modern data processing needs. This new industry proliferated with numerous competitors offering a variety of more effective, high speed data processing terminals to replace the outdated Teletype equipment used for input and output (I/O) in computer and data processing systems.¹

The Dataspeed 40/4 service is an evolutionary offering which AT&T regards as simply a modernization of its old fashioned teletypewriters. However, unlike the predecessor teletypewriter devices, the Dataspeed 40/4 is not capable of functioning *at all* without attachment to a computer system's central processing unit (CPU). In other words, the Dataspeed 40/4's sole functional purpose is to perform an input and output service for a computer or data processing system.

B. Proceedings Before The Commission

On November 8, 1975, AT&T filed with the Commission revisions to AT&T Tariffs Nos. 260 and 267 to add the Dataspeed 40/4 to its existing services. (J.A., p. 232) Petitions seeking rejection or, in the alternative, suspension of the tariff revisions were filed by CCIA, International Business Machines Corporation ("IBM"), and the Computer and Business Equipment Manufacturers Association ("CBEMA") alleging that the Dataspeed 40/4 service in fact constituted a data processing service and not a communications offering. The basis for seeking such relief rested on Section 64.702 (b) of the Commission's rules ("Computer Rules")² which prohibits the Bell System from

¹In the case of alphanumeric display terminals, like the Dataspeed 40/4, there are "at least 96 general purpose . . . terminals from 59 manufacturers" available today. Gramholm, "Alphanumeric Display Terminals," *Datamation*, January, 1977, p. 40.

²Section 64.702 of the Commission's rules, 47 C.F.R. §64.702, emerged from the Commission's "Computer Inquiry" and established that common carriers may not offer data processing services except

offering data processing services to others. The Computer Rules evolved from a four-year investigation of the interrelationship between the data processing and communications fields, whereby the Commission ultimately concluded that the public interest would be served by a separation of regulated communications from unregulated data processing.

AT&T opposed the petitions to reject or to suspend by alleging that the Dataspeed 40/4 was simply an improvement over previous communications offerings. AT&T further argued that the Dataspeed 40/4 was designed only to send or to receive messages without altering their content and that the Dataspeed 40/4 was exclusively a communications service.

The Chief of the Common Carrier Bureau rejected the tariff revision based on his findings that since the Dataspeed 40/4 was designed and marketed solely for use in conjunction with a CPU it was therefore an integral part of a data processing system and, as such, was a prohibited Bell System offering under Section 64.702 of the Commission's rules. (J.A., p. 644)

AT&T applied to the full Commission for review of the Bureau Chief's decision with IBM and CBEMA opposing the application. CBEMA also applied for a limited review of the Bureau Chief's order based on its showing that certain materials submitted with the AT&T tariff transmittal were insufficient for the purpose of determining the lawfulness of the tariff revisions sought. On January 5, 1977, the Commission released its Memorandum Opinion

through arm's length affiliates. The Bell System was prohibited from offering data processing services in any form. Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities, 28 F.C.C. 2d 267, 278 (1970), *aff'd in pertinent part*, GTE Services Corporation v. FCC, 474 F.2d 724 (2d Cir. 1973).

and Order ("Order") reversing the Bureau Chief and denying CBEMA's petition for limited review. (J.A., p. 969)

The Commission essentially considered this tariff revision proceeding in two parts. It first considered whether its Computer Rules prohibited the AT&T offering and found that "the maximum separation policy [in its rules] was directed to the provision and utilization of central host computers by communication common carriers," and that "the original Computer Inquiry . . . did not address the question of data processing elements being removed from the central computer and distributed among various components within . . . the offering."³ As the second step in its examination, the Commission considered whether the Dataspeed 40/4 was a data processing device separate and apart from its Computer Rules. Looking at the primary purpose of the service offering, the Commission concluded that "[w]hat is being offered is a communications service wherein minimal data processing functions are incorporated . . . to facilitate the efficient transmission of data over the communications link."⁴ Accordingly, the Commission allowed the AT&T tariff to go into effect on fourteen days notice.

CCIA sought a stay of the Commission's order both before the Commission and before this court. The Commission denied CCIA's motion, but extended the effective date of the tariff until this court could rule on the stay request. (J.A., p. 989) On January 25, 1977, after hearing oral argument, this court denied the CCIA's Motion for Stay.

³Order at 11. (J.A., p. 979)

⁴Order at 13. (J.A., p. 981)

ARGUMENT

I. THE COMMISSION'S FAILURE TO RULE ON PETITIONER'S REQUEST FOR A SUSPENSION OF THE AT&T TARIFF REVISION IS AN UNJUSTIFIED DEPARTURE FROM ITS EXISTING RULES OF PROCEDURE.

In CCIA's Petition for Relief filed with the Commission on December 31, 1975, CCIA requested that the AT&T tariff amendments be rejected or, in the alternative, that they be suspended until their lawfulness could be investigated under Section 204 of the Communications Act.⁵ IBM and CBEMA also made similar requests in their initial filings for an order of suspension and CBEMA, in essence, restated this request in its Application for Limited Review.⁶ The procedural requirements for tariff suspension requests, as contained in Section 1.773 of the Commission Rules were observed by CCIA in its petition.

Pursuant to a delegation of authority,⁷ under the Commission's rules giving the Chief of the Common Carrier Bureau rejection authority, but not suspension authority, the Bureau Chief properly considered petitioners' pleas for rejection of the AT&T tariff. In reviewing the Chief's decision, the Commission noted the limitation on the Chief's delegation of authority,⁸ yet nevertheless failed to make any findings or to render any decision on petitioners' request for suspension. As a consequence, petitioners' claims for relief have fallen prey to an unwarranted and unjustified departure from existing Commission rules of procedure.

In failing to rule on petitioner's request, the Commission's *Order* fails to meet the basic standard for all

⁵See Petition for Relief of CCIA. (J.A., p. 445)

⁶See Petition for Limited Review of CBEMA. (J.A., p. 690)

⁷See 47 C.F.R. §0.291 (1976).

⁸See Order at 10, n. 19. (J.A., p. 978)

agency decisions which require a reasoned and supported conclusion for each and every issue raised.⁹ It is well established that improper or unlawful administrative procedures, such as those presented here, provide adequate grounds upon which a reviewing court may reverse an agency's action. Such judicial powers are conferred through the Administrative Procedure Act which states in relevant part that:

"706. To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

* * *

(D) *without observance of procedure required by law;*" 5 U.S.C. § 706 (2) (D) (1970 ed.) (emphasis added)

In the absence of a suspension or waiver of its rules¹⁰ on matters which come before it, the Commission is obliged to follow its own established procedures to ensure that

⁹The Administrative Procedure Act sets this standard for agency decisions:

"All decisions, including initial, recommended and tentative decisions, are a part of the record and shall include a statement of (A) findings and conclusions, and the reasons or basis therefore, *on all the material issues of fact, law, or discretion presented on the records*; and (B) the appropriate rule, order, sanction, relief, or denial thereof." 5 U.S.C. §557(c)(3) (1970 ed.) (emphasis added).

See *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975).

¹⁰See 47 C.F.R. §1.3 (1974).

petitioners receive a fundamentally fair review. Without adherence to these procedures the administrative process takes on an arbitrary demeanor which is wholly at odds not only with the Administrative Procedure Act but with the U.S. Constitution as well. As a party below who has participated in a timely fashion and raised material and substantial questions of law and fact, CCIA is entitled to an orderly consideration of its arguments and to a reasoned disposition of them. By failing to rule on CCIA's request for a suspension of the tariff amendments in order to hold hearings to investigate their lawfulness, the Commission has proceeded in clear violation of its own rules without any expressed or apparent justification and, as a consequence, its *Order* must be set aside.

II. THE ORDER IS UNLAWFUL BECAUSE OF THE COMMISSION'S FAILURE TO HOLD AN EVIDENTIARY HEARING UNDER SECTIONS 201 AND 204 OF THE COMMUNICATIONS ACT TO RESOLVE SUBSTANTIAL AND MATERIAL QUESTIONS OF FACT.

A compelling and material dispute on the record was in regard to the lawfulness of the tariff charges which AT&T had estimated in its initial filing for its tariff revisions. The Commission has made no findings on this issue except to state that the data submitted by AT&T along with its Transmittal, pursuant to Section 61.38 of the Commission's Rules, constituted a *prima facie* showing sufficient to withstand a rejection.¹¹ Notwithstanding petitioner's for-

¹¹See Order at 15. (J.A., p. 983). With regard to carrier data transmitted under Section 61.38 the Commission has consistently held that the *burden of proof* is on the carrier in tariff proceedings involving questions of lawfulness. The Commission's Order falls way short of this standard:

"In short the purpose of the rules is to elicit information and data which will facilitate the Commission's judgment as to whether such proposed tariffs present questions of

mal request, the Commission made no attempt to determine whether the tariff revisions were in fact compensatory or whether the Dataspeed 40/4 was being subsidized by AT&T's monopoly revenues. Such substantial and material questions of fact regarding lawfulness, however, require more than the summary disposition afforded by the Commission.

Where the question of a tariff's lawfulness arises, the Commission is *required* under Section 201 (b) of the Communications Act to evaluate the reasonableness of the carrier charges.¹² This section provides:

"All charges, practices, classification, and regulation for and in connection with such communication service, *shall* be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful. . . ." 47 U.S.C. § 201(b) (1970 ed.) (emphasis added). See Exhibit A.

Despite this statutory mandate, the Commission never reached the question of whether the tariff revisions were in fact lawful but stated only that certain minimal filing requirements had been complied with.

Where a question of lawfulness arises under § 201 whose resolution under that statute requires a hearing, the Commission's authority to hold hearings emanates from Section 204 of the Communications Act which states in pertinent part:

"Whenever there is filed with the Commission any new charge, classification, regulation, or practice,

lawfulness which warrant our investigation and hearing." *Suspension based on lawfulness of tariff*, Docket No. 18703. Amendment of Part 61 of Commission's Rules, 26 RR 2d 1681 (1973).

¹²See e.g. *Press Wireless, Inc.*, 21 F.C.C. 311, *aff'd per curiam*, 264 F.2d 372 (D.C. Cir. 1959).

the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof;" 47 U.S.C. § 204 (1970 ed.) *See* Exhibit A.

That such language is permissive rather than mandatory and that a reviewing court will not interpose its judgment for that of the Commission's unless it finds that there has been an abuse of discretion, is firmly rooted in the case law.¹³ However, the courts have stated that where a party raises a disputed question of fact which is material or substantial, the Commission is without authority to make a public interest finding on the basis of such disputed facts without first holding a hearing.¹⁴ Included in such factual determination are also questions of equity and the public interest.¹⁵

The lawfulness of the tariff charges for the Dataspeed 40/4 service has been in dispute since AT&T first filed its Transmittal. Questions of cross-subsidization and below-cost pricing were raised in both CCIA's and CBEMA's petitions to reject or suspend the tariff and these issues were pursued vigorously by CBEMA during each stage of administrative review. They are questions of material fact which go to the very heart of this matter and the Commission's failure to regard them seriously, without the benefit of a hearing, represent an abuse of agency discretion. Furthermore, the question of lawfulness involves more than just a factual dispute over the costs and revenues

¹³*See, e.g.,* Marsh v. FCC, 436 F.2d 132 (D.C. Cir. 1970); United Telegraph Workers v. FCC, 114 US App DC 190, 436 F.2d 920 (1970).

¹⁴*See* Marsh v. FCC, 436 F.2d 132 (D.C. Cir. 1970). *See also* CBC v. FCC 505 F.2d 320, (D.C. Cir. 1974) (dealing with the question of a hearing under §309 of the Act).

¹⁵*See* Wometco Enterprises, Inc. v. FCC, 114 US App DC 261, 314 F.2d 266 (1963).

associated with the tariffed offering. It also raises various equitable and public interest questions regarding the desirability of allowing competition between regulated and unregulated suppliers, the same questions and concerns which the Commission sought to resolve with the maximum separations approach in its Computer Rules.

Petitioners also presented substantial and material evidence in their written submissions to call into question AT&T's assertions that the Dataspeed 40/4 was a communications rather than a data processing device. Although the Dataspeed 40/4 performs some communications functions it was shown that its primary purpose, indeed its sole purpose, is to provide remote access to the central processing unit of the customer's computer.¹⁶ In this manner the Dataspeed 40/4 is integrated with the computer system in which it is used. The Commission also found that the terminal is incapable of communicating with another Dataspeed 40/4 without the use of a host computer, a capability which has been traditional in all predecessor Teletypewriters.¹⁷

The undisputed physical capabilities of the Dataspeed 40/4 demonstrate that it is a device which can perform a myriad of functions which the Commission had previously characterized by its own rules as being those of data processing rather than of communications. For example, the Dataspeed 40/4 has the capability to input, store, retrieve, edit, display, and check for errors in the user's data according to "hardwired" (programmed) instruction in its read only memory (ROM).¹⁸ The Computer Rules specifically define data processing to include these func-

¹⁶See Order at 11. (J.A., p 979)

¹⁷*Id.*

¹⁸See Order at 12, 13. (J.A., p. 980-81)

tions¹⁹ yet the Commission has found that the Dataspeed 40/4 is not a data processing service. Thus, the questions of whether the Dataspeed 40/4 is in fact an integral part of a data processing service and whether the data processing functions performed by the Dataspeed 40/4 predominate over the communications functions are substantial and material questions of fact in dispute which only an evidentiary hearing on the record can resolve.

For the Commission to totally ignore petitioners' request for a hearing when the lawfulness of AT&T's tariff has been brought into question because of factual matter that is either non disclosed²⁰ or is in dispute on the record, is an abuse of discretion under the Communications Act of 1934. Accordingly, this matter should be remanded for hearings to resolve the serious factual, equitable, and public interest questions raised in petitioners' request for suspension of the AT&T tariff revision.

III. THE COMMISSION'S ORDER IS PLAINLY ERRONEOUS AND INCONSISTENT WITH SECTION 64.702 OF ITS RULES AND REGULATIONS.

The Chief of the Common Carrier Bureau, looking solely at the Dataspeed 40/4's technical characteristics and its intended use, concluded that the Dataspeed 40/4 was a device which came within the purview of Section 64.702 of the Commission's Rules and Regulations because it was inextricably intertwined with a central computer for its operations, and was designed and marketed solely for use

¹⁹Section 64.702(a)(1) of the Commissions rules define data processing as:

"the use of a computer for operation which include, *inter alia*, the functions of storing, retrieving, sorting, merging, and calculating data, according to programmed instructions." 47 C.F.R. §64.702 (a)(1) (1973).

²⁰See letter of March 10 from Kittner to Catucci. (J.A., p. 652)

with a data processing system.²¹ Upon review, the Commission disagreed with the Chief's position, holding instead that the Dataspeed 40/4 does not come within the scope of Section 64.702 because the original Computer Inquiry, from which that Section evolved, addressed only those data processing functions performed by a central computer and "did not address the question of data processing elements being removed from the central computer."²² However, neither the history of the Computer Inquiry nor a reasoned interpretation of the Commission's rules supports such a conclusion.

While it is true, as the Supreme Court has said in *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945), that with regard to questions of rule construction "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation," such a standard does not bind the reviewing court where clear evidence of error can be shown. In the case at hand, the Commission has misconstrued the regulatory intent underlying its Computer Rules and has therefore rendered a clearly mistaken and erroneous interpretation of those rules — one which is clearly at odds with their plain meaning.

A. The intent of the Computer Rules and the resultant maximum separation policy was to prohibit unfair competition between regulated common carriers and unregulated companies competing in the data processing field.

The original Computer Inquiry was *prompted* by the practice of common carriers selling excess computer capacity during the off-peak periods when their own

²¹See Memorandum Opinion & Order, released March 3, 1976, at 6, 7 ("Chief's Order"). (J.A., p. 644)

²²See Order at 11. (J.A., p. 979)

message switching computers were idle.²³ While such carrier activity, which is not at issue here, was the primary impetus for the Commission's inquiry, the actual principal focus of those proceedings, which was eventually to last for five years and to receive input from sixty parties,²⁴ was of considerably broader scope. That initially narrow proceeding evolved into a consideration of the issue of competition in general between regulated and unregulated suppliers of data processing services. The Commission's latest reading of this administrative history largely confuses its original thrust with its ultimate administrative intent and, consequently, its *Order* grossly belies the record of that inquiry.

In its final order of the Computer Inquiry the Commission's general view was expressed as follows:

"It is our view that the total record herein, including arguments addressed in both written and oral presentation to us, supports the conclusion that without appropriate regulatory safeguards, the provision of data processing services by common carriers could adversely affect the statutory obligation of such carriers to provide adequate communication services under reasonable terms and conditions and impair effective competition in the sale of data processing services." Computer Inquiry, 28 FCC 2d 267, 268 (1971).

The regulatory concerns which the Commission expressed regarding carrier-provided data processing services were several and included such matters as possible adverse effects on efficient and economic common carrier services, passing on of data processing costs to common carrier users, cross-subsidization of data processing services by

²³See *GTE Service Corporation v. FCC*, 474 F.2d 724 (2nd Cir. 1973).

²⁴See Tentative Decision 28 F.C.C. 2d 291 (1970).

common carrier revenues, and other related anti-competitive practices.²⁵ Because of these serious concerns the Commission determined that an appropriate regulatory safeguard would be to require "a maximum separation of activities which are subject to regulation from *non-regulated activities involving data processing*."²⁶

The logic in this safeguard devolves primarily from a widely shared belief, indeed from a cornerstone of our national economic philosophy, that unfettered competition is a preferable economic objective to government regulation and that unless the public interest clearly demands otherwise, governmental intrusion must give way to the free market. Consequently, the very basis for the Computer Inquiry was the curtailing of the activities of those regulated common carrier monopolies which were seeking entry into an industry that had developed in a purely competitive environment and which exhibited none of the characteristics calling for governmental regulation.²⁷

The Commission now reads its history to support its contention that the Dataspeed 40/4 terminal falls outside the scope of this inquiry. In so doing, the Commission has indulged in an overly narrow interpretation of a record that clearly evinces a generally broad administrative intent. Moreover, it stands as patently illogical that the Commission's expressed regulatory concerns could have been intended to pertain only to carrier-provided data processing services involving a central computer but not to carrier-provided data processing involving component equipment such as I/O data terminals and other system devices, especially when the underlying justification for such concerns are identical, i.e., the impairment of competition and possible adverse effects on common carrier services.

²⁵See Computer Inquiry 28 F.C.C. 2d 267, 268 (1971).

²⁶*Id.* (emphasis added).

²⁷See Tentative Decision 28 F.C.C. 2d 291, 297 (1970).

Furthermore, Section 64.702 (d) of the rules expressly prohibits a common carrier from making available to any other entity "any *capacity or computer system component* which that carrier uses . . . for the provision of its common carrier communication services." Even a cursory examination of the record in the Computer Inquiry clearly shows that the concerns over competition between carriers and unregulated suppliers had been adequately addressed regarding not just the data processing services but the I/O terminal and system component equipment areas as well. The Commission's holding to the contrary can only be seen as a radical departure from clear administrative intent and is plainly erroneous in this regard.

B. The Computer Rules were intended to be flexible enough to cover technological advances in future offerings.

In its analysis of the Dataspeed 40/4, the Commission opined that because data processing technology had so advanced since its final decision in the Computer Inquiry, the existing rules were out of date and would, therefore, need to be reexamined.²⁸ Thus, the Dataspeed 40/4 was concluded to be an evolutionary device for which the Computer Rules were simply out of date. However, a closer examination of the record in that inquiry shows that such a conclusion is plainly erroneous and inconsistent with the Commission's previously stated intent.

At the time of the Computer Inquiry, the Commission had anticipated that future offerings might combine communications and data processing functions into a packaged service which might not fit the technological definitions of the day. This is readily discernible from its decision to render *ad hoc* evaluations on a case-by-case basis as

²⁸See Order at 13. (J.A., p. 981)

technology evolved.²⁹ In this regard, the Commission stated:

"We believe, however, that in a field as dynamic and innovative as this one, it is not possible to formulate a sufficient number of hypothetical situations which would provide meaningful guidelines Instead . . . we believe that *guidelines for the industry* and the formulation of general principles *can best be accomplished by review and evaluation on an ad hoc basis of factual situation as they develop* — under such circumstances *we will be reacting to demonstrated needs* and will be developing precedents *related to the 'real world' in the data/communications field.*" Computer Inquiry 28 F.C.C. 2d 267, 279.

The Commission was fearful that a too rigid approach in determining what is a data processing and/or a communications service might, over time, leave its Computer Rules technologically inflexible. Hence, the Commission endeavored to create a regulatory environment that would coexist with such future technical developments as carrier-provided synchronous data terminals like the Dataspeed 40/4.

A further indication that the Commission was contemplating future offerings and not just data processing systems, circa 1970, when it drafted the Computer Rules is apparent from its stated comments regarding upgraded offerings. Though the Commission was primarily concerned with the *loss* of a needed communications service it nevertheless envisioned a point in time when a carrier may . . . seek to detariff the service by purpose *altering its nature to an extent sufficient to transform it into a data processing*

²⁹See Computer Inquiry 28 F.C.C. 2d 267, 276 (1971).

service, hybrid or otherwise."³⁰ The Dataspeed 40/4, which AT&T admits to be an upgraded teletype service, represents just such a contemplated alteration — a "non-intelligent" teletype device that has been re-engineered to become a "smart" data processing terminal. The position now taken by the Commission that the Computer Rules were not intended to embrace technical advancements like the distribution of data processing into terminal equipment is a serious misconstruction of the record in that inquiry. Hence, the Commission's decision that an offering such as the Dataspeed 40/4 was not intended to come within the purview of the Computer Rules is based on a plainly erroneous interpretation of the Computer Inquiry and, as such, the Commission's *Order* on the AT&T tariff revision must be set aside.

C. The Commission's construction of the undefined term "computer" represents a clearly erroneous interpretation of the term in light of both existing technology and in light of its ordinary meaning in the Computer Rules.

In rejecting the Bureau Chief's description of a data processing system as being basically an integration of several processing devices, the Commission has displayed an obvious misunderstanding of technology and in doing so has relied on a contrived definition of the word "computer" which does not exist. Submitted to the Commission was the following undisputed description of data processing technology:

"Computer systems typically consist of a group of electronically interconnected 'boxes' (called 'hardware') operating in conjunction with or under the control of a set of electronic instructions

³⁰See Computer Inquiry, 28 F.C.C. 2d 267, 280 (emphasis added).

(called 'software'). These boxes are not independently useful — they must operate together in what is called a computer (or electronic *data processing* — EDP) 'system'.

* * *

Organizationally, the center of a system is referred to as the 'central processing unit' ('CPU'); the rest of the hardware in the system is called peripheral equipment. The CPU along with software performs storage, input, and output functions as well. Peripheral boxes store information, *perform processing* and control functions, and provide a means for users to 'input' information or data into a computer system and to receive intelligible 'output' from the system." See *Petition of IBM* at 2, 3 (emphasis added). (J.A., p. 414-15).³¹

This unchallenged description of a computer system manifestly supports the Bureau Chief's concept of data processing as being an overall functioning of several component devices that perform the input, processing, and output activities on data for a given user. Data processing does not occur independently of the input and output of data. Input and output can occur either locally or from some remote location and this purely geographical factor does not make the I/O function any less an integral part of data processing nor does it change its basic function to be one of communications rather than data processing. It is quite difficult to assign discrete data processing functions among or within the various system components and then expect to separate out the communications functions as this tends to make arbitrary and artificial distinctions at odds with the

³¹See also *Telex Corporation v. IBM*, 510 F.2d 894, 899 (10th Cir. 1975).

actual technology. Even so, this is precisely what the Commission has done in its Dataspeed 40/4 decision.

As stated, the Commission has determined that Section 64.702 applies only to data processing services performed by a central computer and does not extend to situations where such data processing capability is moved into the network. However, the Computer Rules do not provide, nor does the Commission proffer any definition of the term "computer" (or of its concept of "central computer") on which it has based its reasoning. The Rules provide a definition for data processing but the term computer has been left purposefully vague. The reason for so doing was to avoid exactly the sort of predicament in which the Commission now finds itself. For example, if the Commission means that a central processing unit (CPU) alone is what comprises a "central computer," then all of a system's peripheral equipment would necessarily fall outside of Section 64.702, along with the Dataspeed 40/4 and similar data terminal equipment. This characterization would necessarily place tape and disc drives, card readers, line printers and add-on memory units outside of the rule also. However, such an interpretation would expressly contradict Section 64.702 (d) which deals with system component offerings by carriers, and which states in relevant part that:

"No common carrier . . . shall . . . make available . . . any *capacity or computer system component* on its computer system. . . ." 47 C.F.R. § 64.702(d) (1973).

Thus, it can be safely assumed that the Commission intended to include more than just the CPU in its characterization of the term "computer," but just how much more is still not clear.

If the Commission intended the term central computer to mean not only the CPU but also those peripheral devices which are directly attachable to the CPU and operate in a

"local mode."³² such as tape and disc drives, card readers, and other system components, then it can be easily shown that the Dataspeed 40/4 is just as much a part of this central computer as are these other peripheral devices, or at least that the Dataspeed 40/4 is a component device within the meaning of Section 64.702 (d). In either case the Dataspeed 40/4 is a prohibited offering under the Commission's Rules.

The Dataspeed 40/4 and the cluster controller were designed specifically for communications with a computer. This fact is unrefuted on the record.³³ As designed, this I/O assembly can be connected to a CPU either over a carrier's telephone line or can be connected directly to the CPU with a user provided coaxial cable.³⁴ In the case of connection via a carrier's telephone line facility the Dataspeed 40/4 and controller would operate as a remote I/O device whereas in the case of direct connection the Dataspeed 40/4 and controller would operate as a local I/O device — *just like* the card readers, tape drives, and disc drives — as an integrated part of the central computer. Since the Dataspeed 40/4 would function no differently to the user in either mode, it is patently erroneous for the Commission to assume that by merely increasing distance between the CPU and the terminal the characteristics of this device suddenly change from a component part of a central computer into a communications device. If this be the Commission's

³²Local mode refers to the attachment of a device to a CPU with a coaxial cable rather than over a telephone line. The reason for this distinction being the proximity of the device to the CPU.

³³See Order at 11. (J.A., p. 979)

³⁴To connect a Dataspeed 40/4 and controller locally involves only a minor interface adjustment. See Reply of IBM to Opposition at 8. (J.A., p. 490). The Commission does not appear to have even considered the ease with which the Dataspeed 40/4 could be made to operate in local mode, though such was extensively discussed on the record. *Id.*: See Opposition of IBM at 13. (J.A., p. 495)

reasoning, then remotely installed card readers, disc drives, and memory units, could all be permissible carrier offerings under the Computer Rules — a conclusion that grossly distorts even the most basic understanding and meaning of these rules.

In similar cases of rule construction, courts have held that where a rule is subject to differing interpretations, an agency's failure to evaluate the conflicting policies which weigh on either side of the issue gives cause for a reviewing court to vacate that agency's order.³⁵ The Commission's Order which is now before this Court requires at the very least an articulated construction of the term "computer" as used in Section 64.702 and such a construction is noticeably absent from the record. Without a reasoned and supported interpretation of this term there is no indication whether the Commission has properly evaluated the policies surrounding the issue of whether the Dataspeed 40/4 is or should be considered a component of a computer system within the meaning of Section 64.702 (d)³⁶ of the Commission's rules. The bold use by the Commission of an undefined term suggests in fact that it has not considered other interpretations or possible meanings of its rules and

³⁵See *Poole Broadcasting v. FCC*, 442 F.2d 825, 831 (D.C. Cir. 1971).

³⁶See *GTE Service Corporation v. FCC*, 474 F.2d 724 (2nd Cir. 1973). The Court in interpreting the Commission's policy regarding carrier-provided component equipment stated:

"Rule 64.702(d), although not in the tentative rules, is clearly within the 'maximum separation' approach of the Commission. Its prohibition against the leasing or selling of extra capacity or *computer system components* is aimed at the protection of efficient telephone service to the public by eliminating the possibility of a diversion of facilities to other purposes." *Id.* at 732. (footnote omitted) (emphasis added)

The policy question over the diversion of carrier facilities as the result of competition with unregulated data processing manufacturers was not even considered in the Commission's Order.

its decision on the Dataspeed 40/4 service suffers accordingly.

As a further point regarding the Commission's concept of a central computer, it is noted that the *Order*, as it presently stands, leads to a result wholly inconsistent with the overall administrative history in the Computer Inquiry. If one can accept the notion that distributed data processing is not covered by the Commission's existing rules then one must face the *reductio ad absurdum* that a carrier can legally provide a full network of (distributed) data processing services and equipment as long as there exists, somewhere, a user-provided central computer that coordinates the network's operations. Such a conclusion must be seen as a devious and untenable construction, for it renders the existing rules vapid and irrelevant to the very issues raised in the Computer Inquiry.

By its *Order* the Commission is shown to have cast aside its administrative history to reach a conclusion on the Dataspeed 40/4 that is plainly erroneous and inconsistent with the clear intent of its Computer Rules. Additionally, the Commission has failed to properly construe undefined terminology that goes to the very heart of this decision. Therefore, based on these and other stated reasons the Commission's *Order* should be vacated and remanded for further proceedings.

IV. The Commission's Determination that the Dataspeed 40/4 is an Allowable Communications Offering Within the Meaning of §§ 201-205 of the Communications Act is an Erroneous Conclusion of Law and Must be Set Aside.

Upon determining that the Dataspeed 40/4 offering did not fall within the scope of Section 64.702, the Commission then endeavored to evaluate the characteristics of the of-

fering apart from its Computer Rules.³⁷ In applying basically a "primary purpose" test, the Commission held that:

"[the] existence of data processing characteristic in the service offering . . . does not lead to the conclusion that the service is primarily a data processing rather than a communications service. The data processing function as utilized in the Dataspeed 40/4 device unquestionably results in the more efficient utilization of the communications channel which links the remote access device to the central computer What is being offered is a communications service. . . ."
Order at 13 (emphasis added). (J.A., p. 981).

Assuming, *arguendo*, that the factual basis supporting the Commission's conclusion is undisputed, the conclusion itself requires an application of the law to the facts and, thus, involves a question of federal law not binding on this court. Courts have long held in this regard that administrative decisions that resolve questions of law³⁸ or mixed questions of fact and law³⁹ are not controlling upon review and may be set aside if found to be incorrect.

³⁷See Order at 12. (J.A., p. 980) The question which the Commission ostensibly was dealing with at this juncture involved a determination of whether the Dataspeed 40/4 was a communications service or facility within the meaning of §153 (a) of the Communications Act. See 47 U.S.C. §153 (a) (1970 ed.).

³⁸Section 706 of the APA provides that:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret Constitutional and statutory provisions . . ." 5 U.S.C. §706 (1970 ed.). See also, *NLRB v. Brown*, 380 U.S. 278, 290-292, 85 S.Ct. 980, 987-989 (1965).

³⁹See e.g. *ICC v. Union Pacific R.R.*, 222 U.S. 541, 547, 32 S.Ct. 108, 110 (1912).

The proceedings below established the following facts regarding the data processing characteristics of the Dataspeed 40/4 terminal:

1. The Dataspeed 40/4 is incapable of functioning without being connected to a computer system.⁴⁰
2. The Dataspeed 40/4 uses a synchronous communications protocol which prevents it from initiating any data communications until first activated by the computer system.⁴¹
3. The Dataspeed 40/4 has two memory chips; one contains hardwired logic to control the operations of the terminal and to coordinate I/O with a computer system; and the other is used to store data.⁴²
4. The Dataspeed 40/4 performs processing functions on data which include *inter alia*, storage and retrieval, buffering, editing, displaying, error checking, and formatting.⁴³

In addition, the marketplace for this particular type of terminal device was shown to be competitive, innovative, and rapidly growing.⁴⁴ Moreover, the Chief of the Common Carrier Bureau found and the Commission did not refute that the Dataspeed 40/4 was designed and marketed for use within "the competitive data processing industry."⁴⁵

⁴⁰See Order at 11. (J.A., p. 979)

⁴¹Synchronous terminals, also known as "polled" terminals, must await their turn (in a computer system's polling sequence) to transmit data—i.e. until the CPU acknowledges that it is ready to receive input. Asynchronous terminals, on the other hand, initiate the transmission of data when the user, not the system, is ready.

⁴²See Order at 4, 10. (J.A., p. 972, 978)

⁴³See Order at 12. (J.A., p. 980)

⁴⁴See Note 1, *supra*.

⁴⁵See Chief's Order at 6. (J.A., p. 649)

Yet despite these findings of fact the Commission still reached the conclusion that the Dataspeed 40/4 was primarily⁴⁶ a communications offering which serves the public interest.

The legal question that petitioner poses does not concern what the Dataspeed 40/4 devices does or how it functions, for this has been generally agreed on. Rather, it involves the meaning of the legal concept of communications and the refinement of that meaning in light of the particular facts of this case. The issue presented to the Commission and now to this court is, thus, whether the Dataspeed 40/4 terminal is a communications service offering within the statutory meaning of §§ 201-205 of the Communications Act of 1934.⁴⁷

The inherent inconsistency in the Commission's determination that the Dataspeed 40/4 is a "communications device" may be starkly illustrated through a contrast of the AT&T product with the numerous identical devices produced by competitors. As the Commission noted, many non-carrier manufacturers offer computer terminal devices virtually indistinguishable from the Dataspeed 40/4 — the IBM 3270 and the Courier 270 are but two examples. These

⁴⁶The Commission acknowledged that the Dataspeed 40/4 was on the borderline between communications and data processing and commented that a point could easily be reached "beyond which a service patterned after the Dataspeed 40/4 offering would, in all reality, constitute data processing." Order at 13. (J.A., p. 981)

⁴⁷The definitional section of the Communications Act is of little assistance on this matter for it defines "wire communications" in overly broad and general terms. Section 201 through 205 describes the role of the Commission with respect to common carrier communications service offerings and it is this portion of the Act which embodies the conceptual understanding of communications services and facilities. Sections 153 (a), 201-205 of the Communications Act of 1934 are set out in Exhibit A.

devices are typically designed for both local and remote attachment to a CPU.⁴⁸

There can, of course, be no question that when the terminal devices are employed locally, they are performing no communications functions; rather, they provide input and output from a CPU in close physical proximity, or classical data processing. The practical effect of the Commission's decision is to hold that this pure data processing function is somehow transmogrified into a communications function when the device is used in a remote location and attached to common carrier wires.

The fallacy in the Commission's reasoning is simple — but for very minor differences in circuitry, terminal devices employed at both local and remote locations are simply indistinguishable. Not only do the terminals perform the same functions whether employed locally or remotely, but, for all practical purposes, their components are the same.⁴⁹ The plain fact is that it is the common carrier wires, and not the terminal interface, that communicate to the remote terminal. The virtually inconsequential circuitry differences between interfacing the local terminal directly with the CPU and connecting the remote terminal through the carrier's wires to the CPU cannot be relied upon to support the Commission's apparent conclusion that the physical location of the terminal is the central factor in making the communications/data processing distinction. It is sub-

⁴⁸Approximately two-thirds of the terminals sold by IBM are attached locally, while the remainder are employed in remote access situations.

⁴⁹For example, in the typical Courier 270 the manufacturing costs of a remote terminal device have about 95% commonality with those of a local terminal device. Phrased differently, this means that but 5% of the manufacturing costs of a remote system are attributable to items not found in the local terminal, a clearly inconsequential difference in terms of the essential function of the device.

mitted, therefore that the Commission's *Order* so plainly ignores these factual data processing characteristics of the Dataspeed 40/4 and is further so devoid of any reasoned and adequately supported public interest finding on the competitive dangers of carrier entry into an unregulated industry,⁵⁰ that it amounts to a clearly erroneous interpretation of Sections 201-205 of the Communications Act. This court then has no alternative but to set the *Order* aside.

⁵⁰Petitioners have vigorously argued and supported the contention that it would be contrary to the public interest to permit the Dataspeed 40/4 to be offered under tariff since this would create the identical situation which in fact precipitated the Computer Rules — i.e. competition being jeopardized by carrier cross subsidization, predatory pricing, and other related antitrust practices. The fact that AT&T is precluded from offering non tariffed services and equipment because of the 1956 Consent Decree (*See United States v. Western Electric*, 1956 Trade Cases 71, 134 [D.N.J.] paragraph V.) is a problem which must be resolved with the Department of Justice and should not diminish from the question of whether the Dataspeed 40/4, as a tariffed offering, serves the public interest.

CONCLUSION

CCIA requests the court to reverse the Commission's *Order* and to remand it for a full hearing on the grounds that the Commission's action represents an unjustified departure from existing Commission rules of procedure, is plainly erroneous, is inconsistent with existing Commission regulations, and is in derogation of §§ 201-205 of the Communications Act of 1934.

Respectfully submitted

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EXHIBIT A

§ 153. Definitions.

For the purposes of this chapter, unless the context otherwise requires —

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

SUBCHAPTER II.—COMMON CARRIERS

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in section 153 of this title.

§ 201. Service and charges.

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter

may be classified into day, night, repeated, unrepeatd, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications; *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest; *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter. (June 19, 1934, ch. 652, § 201, 48 Stat. 1070; May 31, 1938, ch. 296, 52 Stat. 588.)

§ 202. Discriminations and preferences.

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier lines of communication, whether

derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of \$500 for each such offense and \$25 for each and every day of the continuance of such offense. (June 19, 1934, ch. 652, § 202, 48 Stat. 1070; Sept. 13, 1960, Pub. L. 86-751, 74 Stat. 888.)

AMENDMENTS

1960— Subsec. (b). Pub. L. 86-751, substituted "common carrier lines of communication, whether derived from wire or radio facilities," for "wires."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 152, 401 of this title.

§ 203. Schedules of charges; filing with Commission; changes in schedules; overcharges and rebates; penalty for violations.

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Com-

mission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of \$500 for each such offense, and \$25 for each and every day of the continuance of such offense. (June 19, 1934, ch. 652, § 203, 48 Stat. 1070.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 152, 401 of this title.

§ 204. Hearings on new charges; suspension pending hearing; refunds.

Whenever there is filed with the Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed change of charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier

or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, after the organization of the Commission, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. (June 19, 1934, ch. 652, § 204, 48 Stat. 1071.)

§ 205. Commission authorized to prescribe just and reasonable charges; penalties for violations.

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of \$1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense. (June 19, 1934, ch. 652, § 205, 48 Stat. 1072.)